

STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE THE
GRIEVANCE COMMITTEE
OF THE
NORTH CAROLINA STATE BAR
12G1199

THE NORTH CAROLINA STATE BAR,
Petitioner

v.

PHILIP M. KLEINSMITH, Attorney,
Respondent

ORDER OF
RECIPROCAL DISCIPLINE

Pursuant to the authority vested in me as Chairperson of the Grievance Committee of the North Carolina State Bar by 27 N.C. Admin. Code Chapter 1, Subchapter B, Rules .0105(a)(12) and .0116(b)(4) of the North Carolina State Bar Discipline & Disability Rules, and based upon the record in this matter, the undersigned finds as follows:

1. On March 20, 2012, the Supreme Court of Arizona issued a Final Judgment and Order reprimanding Phillip M. Kleinsmith (hereinafter "Kleinsmith") in *In re Philip M. Kleinsmith*, No. 11-2745, pursuant to Rule 57(a), Ariz. R. Sup. Ct., for his conduct in violation of the Arizona Rules of Professional Conduct. Kleinsmith was also placed on probation for one year, subject to early termination upon completion and payment for Ethics school, and ordered to pay \$1,200 to the State Bar of Arizona.

2. Kleinsmith was licensed in North Carolina via comity in 2004.

3. Pursuant to 27 N.C. Admin. Code Chapter 1, Subchapter B, Rule .0116(b) of the North Carolina State Bar Discipline & Disability Rules, on February 4, 2013 Kleinsmith was served with the North Carolina State Bar's Notice of Reciprocal Discipline Proceeding ("Notice") by United States Postal Service Certified Mail. The State Bar's Notice cited the reprimand in *Kleinsmith*.

4. The State Bar's Notice directed Kleinsmith to show cause within 30 days of service why imposition of the identical discipline by the State Bar would be unwarranted. The Notice further advised that if no response was received within 30 days, the Chairperson of the Grievance Committee would sign an order imposing reciprocal discipline.

5. Kleinsmith failed to respond or otherwise show cause that imposition of the identical discipline would be unwarranted.

6. The Final Judgment and Order issued by the Supreme Court of Arizona in *Kleinsmith* was predicated on the following facts:

- a. In January of 2010, in Maricopa County Superior Court, Kleinsmith's Complaint on behalf of Webster's Bank ("The Bank") was dismissed for lack of service without an attempt by Kleinsmith to move for an alternate form of service. Additionally, Kleinsmith erroneously certified the case for arbitration (a requirement for cases in which less than \$50,000 is in controversy) despite the case concerning a note of \$400,000;
- b. In February of 2010, in Pima County Superior Court, Kleinsmith, on behalf of the Bank, certified a case for arbitration that involved a \$250,000 principal loan;
- c. In March of 2010, Kleinsmith, in Maricopa County Superior Court, incorrectly certified a case for arbitration despite a principal loan balance at issue of \$63,000;
- d. In April of 2010, Kleinsmith, in Maricopa County Superior Court, filed a complaint on behalf of the Bank. In filing the Complaint, Kleinsmith certified that the claim was for less than \$50,000 and thus, subject to arbitration, even though the note on the property subject to litigation was in excess of \$200,000;
- e. On June 7, 2010, Kleinsmith filed a Complaint on behalf of the Bank of Maricopa County Superior Court. The Complaint was dismissed for lack of service without a motion for alternative service;
- f. In July of 2010, Kleinsmith erroneously certified a Maricopa County case for arbitration;
- g. In July of 2010, Kleinsmith filed a matter on the Bank's behalf in Yavapai County Superior Court, in which he erroneously certified the matter for arbitration;
- h. In August of 2010, in a Maricopa County Superior Court case, Kleinsmith erroneously certified the case for arbitration;
- i. In September of 2010, Kleinsmith improperly certified a case for arbitration in Yavapai County Superior Court concerning a note of \$175,000;
- j. In September of 2010, Kleinsmith filed a Complaint in a Maricopa County Superior Court matter concerning a \$60,000 note. Respondent improperly certified the case for arbitration;
- k. Kleinsmith has provided the following explanation regarding the arbitration certificate errors: "The AZ collection matters we had handled before we were employed by the client were almost always subject of mediation by amount. I did not consider this or direct the paralegal accordingly and, therefore, she continued to elect mediation. I now review every Summons and Complaint to verify whether arbitration applies for the AZ county involved";

1. In a Florida matter, Kleinsmith included an incorrect address and property description in the notice of sale and certificate of title and failed to name the condominium association as defendant. Kleinsmith has indicated that he was in the process of correcting his errors when the client substituted new counsel;
- m. In a Wisconsin matter, the Bank's case was dismissed with prejudice and costs after Kleinsmith failed to appear for two hearings. Kleinsmith explained his failure to appear by offering: "I did not appear at two hearings because WB [the Bank] was negotiating a settlement." As a result of his failure to appear, the matter was dismissed with prejudice. Kleinsmith had the dismissal changed to a dismissal without prejudice, but billed the Bank to file the corrective motion after his failures to appear. The Judge required the client to pay \$651 to the Defendant for the Dismissal without prejudice which the Bank paid through its new substituted counsel; and,
- n. In a Texas matter in the Smith County District Court, Kleinsmith filed a Motion to Withdraw as Counsel and mailed a copy of the motion to the Bank, simultaneously. No prior notification of the withdrawal was given to the Bank. Kleinsmith believed this was sufficient notice because his understanding was that the motion could only be ruled upon if he set it for hearing.

6. Kleinsmith admitted in the Arizona disciplinary proceeding to violating the following Arizona Rules of Professional Conduct: Rule 1.1 (competence); Rule 1.3(a) (diligence); Rule 1.4 (communication); Rule 1.5 (fees); Rule 1.16 (declining or terminating representation); Rule 5.3 (responsibilities regarding nonlawyer assistants); Rule 8.4(d) (conduct prejudicial to the administration of justice); and, Rule 8.4(a) (knowingly assist another to violate or attempt to violate the Rules of Professional Conduct).

7. Kleinsmith agreed to the discipline imposed by the Supreme Court of Arizona.

8. Kleinsmith was afforded Notice of and an opportunity to show cause why reciprocal discipline by the State Bar would be unwarranted, but Kleinsmith did not respond.

BASED UPON THE FOREGOING FINDINGS, the Chairperson of the Grievance Committee makes the following CONCLUSIONS OF LAW:

1. The North Carolina State Bar has jurisdiction over the subject matter of this proceeding and over the person of Philip M. Kleinsmith.

2. The State Bar has complied with the procedure for imposition of reciprocal discipline pursuant to 27 N.C. Admin. Code Chapter 1, Subchapter B, Rule .0116 of the North Carolina State Bar Discipline & Disability Rules.

3. The conduct admitted by Kleinsmith and found by the Supreme Court of Arizona constitutes conduct in violation of Rules 1.1, 1.3(a), 1.4, 1.5, 1.16, 5.3, 8.4(a) and 8.4(d) of the

North Carolina Rules of Professional Conduct and justifies the imposition of reciprocal discipline in this state.

4. The equivalent discipline imposed by the Supreme Court of Arizona should be imposed on Kleinsmith's record in the State of North Carolina. The equivalent discipline in North Carolina to that imposed by the Supreme Court of Arizona is reprimand.

THEREFORE IT IS HEREBY ORDERED THAT:

1. Philip M. Kleinsmith is hereby REPRIMANDED in North Carolina.
2. In accordance with the policy adopted July 23, 2010 by the Council of the North Carolina State Bar regarding the taxing of administrative fees and investigative costs to any attorney issued a reprimand by the Grievance Committee, an administrative fee in the amount of \$350.00 is hereby taxed to Kleinsmith.

This the 8th day of May, 2013.



Margaret M. Hunt, Chair
Grievance Committee